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IN THE

Supreme Court of the United States

THE CLEARING HOUSE ASSOCIATION L.L.C.,
Petitioner,

—v.—

BLOOMBERG L.P. and THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Exemption 4 of the Freedom of Information Act authorizes a federal agency to withhold "[1] trade secrets and commercial or financial information [2] obtained from a person and [3] privileged or confidential." 5 U.S.C. § 552(b)(4). The Second Circuit ruled that this exemption does not authorize the Board of Governors of the Federal System (the "Board") to withhold reports disclosing the identities of banks that obtained loans through the Federal Reserve System, along with the amounts and durations of such loans. In doing so, the Second Circuit held that (1) the highly confidential bank information in these reports was not "obtained from" the borrowing banks; and (2) the Board could not withhold this information on the basis that its disclosure would impair the effectiveness of its lending programs.

The questions presented are:

1. Whether the identity of, and highly confidential terms on which, a third party transacts with a federal agency is information "obtained from" that party and, therefore, within the scope of FOIA Exemption 4?

2. Whether information is "confidential" under FOIA Exemption 4 when its disclosure would impair the effectiveness of federal agency programs?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner is The Clearing House Association L.L.C. The respondents are Bloomberg L.P. and the Board of Governors of the Federal Reserve System.

The Clearing House Association L.L.C. has no corporate parents, and no publicly-held company owns 10% or more of the stock of The Clearing House Association L.L.C.

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Petitioner The Clearing House Association L.L.C. ("The Clearing House")[1] respectfully petitions

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[1] Established in 1853, The Clearing House is the United States' oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House Association is a nonpartisan advocacy organization representing through regulatory comment letters, amicus briefs, and white papers the interests of its member banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks

(footnote continued)

for a writ of certiorari to review the March 19, 2010 judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the Second Circuit is reported at 601 F.3d 143. The orders of the Second Circuit denying rehearing are unreported. The decision of the District Court is reported at 649 F. Supp. 2d 262.

JURISDICTION

The Second Circuit entered its judgment on March 19, 2010, and denied the Board's and The Clearing House's petitions for panel and *en banc* rehearing on August 20, 2010. By orders dated August 27, 2010, the Second Circuit granted the Board and The Clearing House a 60-day stay pending the filing of a petition for a writ of certiorari. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provision involved is Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4).

(footnote continued)
and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated clearing-house, funds-transfer, and check-image payments made in the U.S. *See* www.theclearinghouse.org (last visited on Oct. 20, 2010).

STATEMENT OF THE CASE

The Second Circuit's decision below, which openly split with the D.C. and First Circuits, stems from an unprecedented FOIA request by Bloomberg L.P. ("Bloomberg") demanding that the Board of Governors of the Federal Reserve System (the "Board") disclose highly confidential reports containing the identities of banks that borrowed from the Discount Window (a permanent lending program of the Federal Reserve Banks) during the recent financial crisis, along with the amounts and durations of such loans.[2]

Bloomberg's request is unprecedented because, since the establishment of the Discount Window program in 1914, the Board has never disclosed the identities of borrowing banks or the loan-by-loan details of their borrowings. (The Board has historically published such information weekly on an aggregate basis.) That longstanding policy of borrower confidentiality rests on the recognized concern that depositors, counterparties, and market participants may infer (perhaps erroneously) that a bank that borrows from the Discount Window is

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[2] The request also demanded that the Board disclose such information for the now-discontinued Primary Dealer Credit Facility ("PDCF"), Term Securities Lending Facility ("TSLF"), and Term Auction Facility ("TAF"). Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376 (2010), the Board will be required to disclose transaction-level details of loans made through the PDCF, TSLF and TAF, including the identities of borrowing entities, on or before December 1, 2010. *See* Dodd-Frank Act § 1109(c). Accordingly, the portion of this case about those facilities will be moot as of that date.

experiencing liquidity problems and react by withdrawing their funds from the bank or discontinuing to extend credit.

The Dodd-Frank Act now requires the Board to disclose the identities of banks that borrow from the Discount Window, along with other transaction-level details of their borrowing, approximately two years after such borrowing occurs. *See infra* at 12-13. But the Act does *not* require the Board to disclose information concerning Discount Window lending that took place prior to the Act's enactment. Allowing the Board to withhold this pre-enactment Discount Window lending information is important, because disclosure of this information threatens to harm the borrowing banks by allowing the public to observe their borrowing patterns during the recent financial crisis and draw inferences—whether justified or not—about their current financial conditions. *See infra* at 10-11.

The Board here sought to protect this pre-enactment Discount Window lending information by invoking Exemption 4 of the Freedom of Information Act ("FOIA"), which authorizes a federal agency to withhold "[1] trade secrets and commercial or financial information [2] obtained from a person and [3] privileged or confidential." 5 U.S.C. § 552(b)(4). Numerous circuit courts have held that information is "confidential" when its disclosure is likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted). The D.C. and

First Circuits have further held that information is "confidential" when its disclosure would impair an agency's ability to "carry[] out [its] mandate." *9 to 5 Org. for Women Office Workers* v. *Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 10 (1st Cir. 1983); *accord Critical Mass Energy Project* v. *NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc).

The Second Circuit below did not question the Board's and the banks' "plausible" and "forceful[]" showing that disclosure of the information sought by Bloomberg "would harm the banks that borrowed" and "the banking system as a whole." *Bloomberg, L.P.* v. *Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 151 (2d Cir. 2010). Instead, the Second Circuit held—as a matter of law—that (1) the Federal Reserve Banks' ("FRB") "executive action" in approving the Discount Window loans meant that the highly confidential bank information was not "obtained from a person" outside the government, and therefore not subject to Exemption 4 protection at all, *id.* at 149; and (2) even assuming that such bank information was "obtained from a person" (the Court here was referring to the FRBs that supplied the raw lending data to the Board), Exemption 4 does not allow an agency to withhold information when doing so "'serves a valuable purpose and is useful for the effective execution of its statutory responsibilities,'" *id.* at 150.

These important rulings of law warrant this Court's review for two reasons.

First, the Second Circuit's ruling will disrupt "long-established procedures" of numerous federal agencies. *See Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 11 (1974) (grant of

certiorari to analyze "the impact of the FOIA upon long-established procedures of the Renegotiation Board"). Many government programs, such as the Export-Import Bank's provision of loans and insurance and the National Institutes of Health's ("NIH") licensing of government inventions, depend on assuring third parties that details of their commercial transactions with federal agencies will remain confidential. In these other commercial transactions, the government typically transacts with third parties in ways that are more extensive than the loan-approval process at issue here. Nonetheless, courts have uniformly held or assumed that details of these commercial transactions are subject to Exemption 4 protection.

The Second Circuit's holding that the FRBs' "executive action" in approving Discount Window loans eliminates Exemption 4 protection for this highly confidential bank information conflicts with this line of cases and threatens to harm the government programs they protect. The harm here is magnified, because any FOIA requester that resides in the Second Circuit will be able to bind a federal agency to that Court's law. *See* 5 U.S.C. § 552(a)(4)(B) (vesting jurisdiction over FOIA actions in, among other venues, "the district court of the United States in the district in which the complainant resides, or has his principal place of business"). This is especially important in that many of the nation's leading media companies (*e.g.*, The New York Times, The Wall Street Journal, and Time magazine) are located in the Southern District of New York.

The line of cases that the Second Circuit's ruling will disrupt is consistent with the bedrock principle, codified in 5 U.S.C. § 552(b) and recognized across the Circuits, that an agency is authorized to withhold information in its entirety where the information consists of exempt data and non-exempt data that are "inextricably intertwined." *See infra* at 28-30. This rule applies fully when third parties transact with an agency: Because information concerning the completed transaction is an indivisible product of exempt data (the terms on which the third party entered into the transaction) and non-exempt data (the terms on which the government approved the transaction), the agency is authorized to withhold such information in its entirety. Certiorari is appropriate to correct the Second Circuit's error and prevent its ruling from harming numerous agency programs far beyond the lending programs at issue here.

Second, the Second Circuit's ruling "conflict[s] with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a); *see also John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 151 (1989) (grant of certiorari in FOIA Exemption 7 case because of "the importance and sensitivity of the issue [presented] and because of different interpretations of the pertinent language of [the exemption]"). Specifically, the Second Circuit's ruling—now binding the financial and media capital of the United States—split with the D.C. and First Circuits on an important question of federal law: Whether information is "confidential" within the meaning of Exemption 4 when its disclosure would impair the effectiveness of government programs.

Underlying this issue is the fundamental question whether this Court should adopt the *National Parks* two-part definition of the term "confidential," from which the "program-effectiveness" test rejected by the Second Circuit emanates. *See generally* Sup. Ct. Rule 10(c) (certiorari may be appropriate where a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court"); *see also Reading Co.* v. *Brown*, 391 U.S. 471, 475 (1968) (grant of certiorari to resolve question of "first impression in [the Supreme Court]" regarding bankruptcy administration); *Am. Fed'n of Musicians* v. *Wittstein*, 379 U.S. 171, 175 (1964) (grant of certiorari to resolve question of "first impression" under the Labor Management Reporting and Disclosure Act).

A. Factual Background.

1. The Discount Window and the Mechanics of Discount Window Lending.

Authorized by the Federal Reserve Act, the Discount Window "is a mechanism by which the twelve Federal Reserve Banks lend funds on a short-term basis, secured by collateral, to eligible depository institutions within their respective districts." (JA-67 ¶ 6.)[3] In performing this lending function, the Discount Window can serve "as an emergency, back-up source of liquidity for

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[3] All citations to "JA" are to the Joint Appendix submitted before the Second Circuit.

institutions that may not have access to ordinary, market sources of funding on a short term basis." (JA-74 ¶ 18.)

A bank eligible to borrow from the Discount Window requests a Discount Window loan by contacting its local FRB. When doing so, the bank supplies to the FRB, among other things, the bank's (i) "[n]ame and location"; (ii) "[t]he amount [the bank is] requesting"; and (iii) "[t]he number of days that funds will be needed."[4] After a bank initiates a Discount Window loan request, FRB staff "review the request, verify collateral and, if approved, enter the loan in the [FRB's] loan and accounting systems." (JA-70 ¶ 11.)

The FRBs, in turn, provide data concerning completed loans to the Board's Division of Monetary Affairs. (JA-38 ¶ 11.) Then, the Monetary Affairs staff use these data to generate "Remaining Term Reports"—the Reports at issue in this appeal—that reflect (i) the names of the borrowers; (ii) the amount of individual loans; and (iii) the origination and maturity dates of each loan. (*Id.*)

2. The Longstanding "Stigma" of Financial Weakness Attributed to Banks That Borrow from the Discount Window.

Because the Discount Window can serve an emergency-lending function, when a bank borrows

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[4] The Mechanics of Borrowing, http://www.frbdiscountwindow.org/mechanics/cfm?hdrID=14 (last visited on Oct. 20, 2010).

from it, market participants, customers, and counterparties may infer that the bank is experiencing "an underlying capital or liquidity problem." (JA-74 ¶ 18.) The public, in other words, may interpret a bank's Discount Window borrowing as a sign of an undisclosed financial problem and mistakenly stigmatize the bank as financially unsound. (JA-74-75 ¶¶ 17-18.) That "stigma" can "quickly place an institution in a weakened condition vis-à-vis its competitors by causing a loss of public confidence in the institution, a sudden outflow of deposits (a 'run'), a loss of confidence by market analysts, a drop in the institution's stock price, and a withdrawal of market sources of liquidity." (JA-74 ¶ 17.) "In extreme cases, such developments can lead to closure of the institution." (*Id.*)

During periods of financial distress, the stigma associated with Discount Window borrowing often intensifies, because market participants have heightened concerns that banks may be experiencing financial difficulties. (JA-75 ¶ 19.) As a result, during these periods (such as those experienced in the early and late 1990s), banks paid higher rates in the private federal funds market to avoid borrowing from the Discount Window. (*Id.*)

The effects of this stigma were further evidenced in the early 1990s, when rumors that Citibank was borrowing at the Discount Window sparked runs at some of its offices in Asia. (JA-76 ¶ 22.) Similarly, in September 2007, British bank Northern Rock experienced a bank run after the BBC reported that the Bank of England had provided emergency financial support to the bank.

See Treasury Committee, The Run on the Rock, 2007-08,-H.C. 56-1, ¶¶ 1, 147.[5]

3. The Board's Longstanding Confidentiality Policy for Discount Window Lending and the Disclosure Regime Established by the Dodd-Frank Act.

Because of the recognized stigma associated with accessing the Discount Window, banks have been reluctant to access this lending facility, even though the Board has long held "information about borrowing by individual banks in the strictest confidence." Brian F. Madigan & William R. Nelson, *Proposed Revision to the Federal Reserve's Discount Window Lending Program*, 88 Fed. Res. Bull. 313, 315 (2002). That historical reluctance stems from the fact that, notwithstanding the Board's longstanding non-disclosure policy, market participants "have at times tried to infer which banks might be borrowing [from the Discount Window] through knowledge of which banks were bidding for funds in the market late in the day and from aggregate data published by the Federal Reserve." *Id.*

The Dodd-Frank Act establishes a new disclosure regime for Discount Window loans made after the Act's enactment. The Board is now required to disclose the identities of banks that

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[5] Available at http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtreasury/56/56i.pdf (last visited Oct. 20, 2010).

borrow from the Discount Window, along with other transaction-level details of their borrowing, approximately two years after such borrowing occurs. *See* Dodd-Frank Act § 1103(b) (amending Federal Reserve Act to require disclosure of post-enactment Discount Window lending—a type of "covered transaction"—"on the last day of the eighth calendar quarter following the calendar quarter in which the covered transaction was conducted").[6] In exchange, the Board is expressly authorized to withhold such information under FOIA. *See id.* (providing that enumerated Discount Window lending data "shall be confidential, including for purposes of section 552(b)(3) of title 5").

The Dodd-Frank Act, however, does not require disclosure of Discount Window lending information prior to its enactment. Specifically, section 1103(b) of the Act, which adds a new section to the Federal Reserve Act, includes a provision stating that "[n]othing in [the new section of the Federal Reserve Act] is meant to affect any pending litigation or lawsuit filed under [FOIA] on or before the date of [the Act's] enactment." This is significant, because, during the recent financial crisis, banks relied upon the Board's confidentiality policy when obtaining Discount Window loans in amounts and at intervals that would permit the

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[6] *See also* Frequently Asked Questions—Discount Window Lending Program, FAQ #11 ("[T]he Federal Reserve will publicly disclose, with approximately a two-year lag, certain information on discount window loans extended on or after July 21, 2010."), http://www.frbdiscountwindow.org/dwfaqs.cfm#ps11 (last visited Oct. 20, 2010).

public to draw inferences—whether fairly or not—about their current financial conditions.

B. Proceedings Below.

1. Bloomberg's FOIA Request and Its Adjudication in the District Court.

On May 21, 2008, Bloomberg sent a FOIA request to the Board, asking for eleven categories of documents relating to securities posted as collateral for Discount Window and other loans made between April 4, 2008 and May 20, 2008. (JA-50-51.) The Board determined that the Reports contained information responsive to the request—specifically, the names of borrowers, and the amounts and terms of individual loans—but concluded that this information was exempt from disclosure. (JA-62.)

On November 7, 2008, Bloomberg filed the instant FOIA action in the Southern District of New York. The Board and Bloomberg each moved for summary judgment, submitting supporting declarations. Specifically, the Board submitted 38 pages of declarations from a senior Board official and two officers of the Federal Reserve Bank of New York responsible for operational details for the Discount Window and the other lending facilities at issue. In those declarations, the Board provided a detailed assessment of the competitive harm likely to occur to banks through disclosure of bank-by-bank, loan-by-loan information. The Board also provided evidence demonstrating the recognized "stigma" associated with Discount Window lending.

On August 24, 2009, the District Court granted Bloomberg's cross-motion for summary judgment, dismissing the Board's evidence of competitive harm as "speculative" or "conjectural" and declining to recognize, as an additional basis for non-disclosure, the Board's interest in advancing its lending programs. *Bloomberg L.P.* v. *Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 280 (S.D.N.Y. 2009). The District Court also held that some of the information contained in the Reports—that is, the amounts and terms of individual loans—was not "obtained from" the borrowing banks, reasoning that the FRBs' "generati[on] [of] the information contained in the [Reports] [was] sufficient to vitiate the applicability of Exemption 4 with respect to that information." *Id.* at 278. At the same time, the District Court recognized that "the borrowers' names," also contained in the Reports, were "obtained from" the borrowing banks. *Id.*

After this ruling, The Clearing House moved to intervene for purposes of appeal, arguing, among other things, that the Board may not adequately protect its interests because the Board had not yet received Solicitor General authorization to pursue an appeal. The District Court granted The Clearing House's intervention motion, and The Clearing House participated as a party in the appeal to the Second Circuit.[7]

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[7] The Clearing House, like other associations of its type, had standing to participate as a party in the appeal and has standing to seek certiorari, because "(a) its members would otherwise have standing to sue in their own right; (b) the

(footnote continued)

2. Fox News's FOIA Request and Its Adjudication in the District Court.

Bloomberg was not alone in its request for Discount Window lending information. On November 10, 2008, Fox News filed a FOIA request (which it subsequently clarified and then supplemented with another) essentially seeking "the names of institutions receiving Federal Reserve lending" from eleven named programs and "any other Federal Reserve lending facility," as well as "an accounting of the collateral provided by these institutions in exchange for the lending" from August 8, 2007 through November 17, 2008. (*Fox* JA-169-71.)[8] In response, the Board identified, among other responsive documents, two types of reports, called "Origination Reports" and "Remaining Term Reports." These reports contained the identities of banks that borrowed from the Discount Window, along with the amounts and durations of the loans they obtained. (*Fox* JA-29-31.) The Origination

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(footnote continued)
interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *see also, e.g.*, *Cuomo* v. *The Clearing House Ass'n, LLC*, 129 S. Ct. 2710, 2714 (2009) (reviewing challenge by The Clearing House to New York Attorney General's investigation of lending practices of certain of its members and other national banks).

[8] All references to "*Fox* JA __" are to the joint appendix filed in the Second Circuit in *Fox News Network, LLC*, v. *Board of Governors of the Federal Reserve System*, No. 09-3795-cv.

Reports contained information for the business days of August 20, 2007 to November 14, 2008; the Remaining Term Reports covered an overlapping period of business days from February 11, 2008 to November 14, 2008. (*Id.*) The Board withheld these reports on the ground that they were exempt under Exemptions 4 and 5 and contained no reasonably segregable non-exempt information. (*Id.*)

Fox News, like Bloomberg, filed an action in the Southern District of New York challenging the Board's decision to withhold these reports. But unlike in *Bloomberg*, on July 30, 2009, the District Court ruled against Fox News, holding, first, that the information in the reports at issue reflected "information that originated with the borrower" and therefore "'obtained from' the borrower." *Fox News Network, LLC* v. *Bd. of Governors of the Fed. Reserve Sys.*, 639 F. Supp. 2d 384, 399 (S.D.N.Y. 2009). The Court also ruled that this information was "confidential" because (1) the Board had sustained its burden of showing "specific and substantial harms to borrowers if the information about Discount Window loans were disclosed"; and (2) disclosure of the reports "would compromise the Board's effective execution of its statutory responsibilities." *Id.* at 400-02.

The Court subsequently amended and filed its final judgment on September 2, 2009. (*Fox* JA-6.) Fox News appealed from this judgment on September 9, 2009. (*Id.*)

3. Proceedings Before the Second Circuit.

The *Bloomberg* and *Fox* appeals were heard in tandem, by the same panel and on the same day. Both appeals concerned the same core issues: (1) whether the identity of a borrowing bank and transaction-level details of its borrowing was information "obtained from a person"; and (2) whether this information was "confidential" within the meaning of Exemption 4.

The Ruling in Bloomberg. The *Bloomberg* and *Fox News* appeals were also decided on the same day, by two separate opinions. In the *Bloomberg* opinion—the one at issue in this petition—the Second Circuit accepted the Board's and The Clearing House's "plausible" and "forceful[]" arguments that disclosure of the Reports would "harm the banks that borrowed" and "the banking system as a whole." *Bloomberg*, 601 F.3d at 150. The Second Circuit nonetheless held that the highly confidential bank information in the Reports was not "obtained from" the borrowing banks—and thus not within the class of information protected by Exemption 4—because the loans at issue "did not come into existence until the Federal Reserve Bank took executive action by granting the loan." *Id.* at 149. In other words, the Court reasoned that the FRBs' "executive action" in "grant[ing]" the loans—even if such approval were "automatic[]"—eliminated any Exemption 4 protection irrespective of the information's commercial sensitivity. *Id.* at 150.

The Second Circuit further held that, even assuming the information in the Reports was

obtained by the Board "from a person" (the panel was referring here to the FRBs that supplied the raw lending data to the Board),[9] Exemption 4 did not authorize a federal agency to withhold information where doing so "'serves a valuable purpose and is useful for the effective execution of its statutory responsibilities.'" *Id.* at 150. The Court reasoned that such an interpretation of the term "confidential" (1) finds "no basis" in the statute; and (2) would "give impermissible deference to the agency," thereby making it the "functional equivalent" of the "'public interest'" standard rejected by this Court, for purposes of Exemption 5, in *FOMC* v. *Merrill*, 443 U.S. 340 (1979). *Bloomberg*, 601 F.3d at 150-51.

The Ruling in Fox. The Court in *Fox* applied the holding in *Bloomberg* to rule that "the information unambiguously at issue in the Fox News requests—the identity of the borrowing bank, the dollar amount of the loans, the collateral securing the loans, and the loan origination and maturity dates—is not protected from disclosure by Exemption 4." *Fox News Network, LLC* v. *Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 158, 160 (2d Cir. 2010). It then proceeded to discuss, in an issue not relevant to this petition, whether the Board had adequately searched for additional agency records held at the Federal Reserve Banks. *See id.* at 160-63.

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[9] The Second Circuit nowhere explained how the FRBs could (1) be considered "agencies" when they approved Discount Window loans and yet (2) be considered "persons" when they supplied the raw lending data concerning these loans to the Board.

Post-Judgment Developments. On May 3, 2010, the Board and The Clearing House filed timely petitions for panel and *en banc* rehearing of the decision in *Bloomberg*. The Board also filed a similar petition for rehearing in *Fox*. While those petitions were pending, the Board submitted a letter in both appeals, pursuant to Federal Rule of Appellate Procedure 28(j), explaining that passage of the Dodd-Frank Act did not moot the appeals.

On August 20, 2010, the Second Circuit denied the rehearing petitions in both *Bloomberg* and *Fox*. Both the Board and The Clearing House subsequently moved to stay the Second Circuit's mandate in *Bloomberg*, arguing that there was "good cause" to do so and that a certiorari petition would present a "substantial question" warranting this Court's review—in other words, that there was a reasonable probability of obtaining this Court's review and a fair prospect of achieving reversal. The Board filed a similar motion in *Fox*. By orders dated August 27, 2010, the Second Circuit stayed its mandates for 60 days in both *Bloomberg* and *Fox* to enable the Board to obtain authorization from the Solicitor General to file a certiorari petition and to enable The Clearing House to file such a petition.

Notwithstanding the Board's receipt of Solicitor General approval to file a request for *en banc* rehearing, and notwithstanding the Board's consistent position that the *Bloomberg* decision will have negative and far-reaching ramifications for banking and other agencies (as detailed in the Board's rehearing petitions), on October 22, 2010, counsel for the Board informed The Clearing House that the Solicitor General denied the Board's request

to file a certiorari petition. This petition, which names the Board as a respondent, followed.[10]

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for two reasons.

First, if left undisturbed, the Second Circuit's ruling will undo a long line of cases authorizing agencies to withhold sensitive details concerning a third party's commercial transactions with the government. This line of cases is critical to protect numerous government functions—such as the ability of the Export-Import Bank to extend loans and insurance, and that of the NIH to license government inventions—that depend on assuring third parties that details of these commercial transactions will not be disclosed. These cases are consistent with the principle, codified in 5 U.S.C. § 552(b) but ignored in the decision below, that an agency is authorized to withhold information where it consists of exempt and non-exempt data that are inextricably intertwined.

Second, this case presents a question of first impression in this Court of undeniable importance to FOIA law, and one over which the Circuits are now split: What is the governing test to determine whether information is "confidential" within the meaning of Exemption 4, and whether this test authorizes an agency to withhold information whose

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[10] The Clearing House also intends to move to intervene in the *Fox* appeal in order to stay that Court's mandate pending the disposition of this certiorari petition.

disclosure would impair a government program. The Second Circuit, which has previously adopted *National Parks*' two-part definition of the term "confidential," improperly rejected the D.C. and First Circuits' extension of *National Parks* to protect an agency's ability to effectuate the purposes of its programs. In doing so, the Second Circuit adopted an overly restrictive textual interpretation of the statute that fails to properly give effect to the purpose behind the exemption.

I. THE SECOND CIRCUIT'S ERRONEOUS "OBTAINED FROM A PERSON" RULING THREATENS NUMEROUS AGENCY PROGRAMS THAT DEPEND ON MAINTAINING THE CONFIDENTIALITY OF COMMERCIAL TRANSACTIONS WITH SUCH AGENCIES.

A. Courts Have Long Held That Exemption 4 Protects Commercially Sensitive Details of Third Parties' Commercial Transactions with Federal Agencies.

The Second Circuit held that the highly confidential bank information in the Reports was not "obtained from" the borrowing banks because the loans did not exist but for the FRBs' "executive action" in "grantin[g]" Discount Window loans, even if such approval was "automatic[]." *Bloomberg*, 601 F.3d at 149.

This holding necessarily threatens to undo Exemption 4 protection in numerous situations where third parties transact with a federal agency.

That is because *every* commercial transaction by a third party with the government reflects both third-party and government action; the transaction voluntarily entered into by the third party would not exist but for government approval and involvement.

Indeed, one lower court has already applied *Bloomberg* to require the Treasury Department to disclose "the name of a commercial bank" that applied for but subsequently withdrew its request for funding through a Treasury lending program, reasoning that the bank's name was not "obtained from a person" because it was "'generated within [Treasury] upon its decision to grant a loan.'" *Fox News Network, LLC* v. *U.S. Dep't of the Treasury*, --- F. Supp. 2d ---, 2010 WL 3705283, at *36-37 (S.D.N.Y. Sept. 3, 2010) (quoting *Bloomberg*, 601 F.3d at 148) (alteration in original).

This ruling is a harbinger of many others. That is because federal agencies frequently interact with third parties in ways far more extensive than the straightforward loan-approval process at issue here. Nonetheless, in these other situations, numerous courts have held or assumed that a third party's commercial dealings with the government consist of information "obtained from a person," and are therefore subject to Exemption 4 protection—

Loans and Insurance Extended by the Export-Import Bank. The Export-Import Bank is a federal agency that "aid[s] in financing and facilitating exports and the exchange of goods and services between the United States and foreign countries." *Judicial Watch, Inc.* v. *Export-Import Bank*, 108 F. Supp. 2d 19, 24 (D.D.C. 2000). To achieve that goal, the Bank "provide[s] guarantees,

insurances, and extensions of credit on competitive terms to United States businesses that seek to export goods and services to other countries." *Id.* These guarantees, insurances, and extensions do not exist but for the Bank's approval, and are subject to negotiation between the Bank, exporters, and other third parties. Parties insured by the Bank, for instance, "often agree to additions to or deletions from the Bank's standard export insurance policy" that may reflect "when the insured has made a concession to the Bank." *Id.* at 29. The Bank also "participat[es] in the negotiation process" with respect to loan agreements that it finances. *Comstock Int'l (U.S.A.), Inc.* v. *Export-Import Bank of the U.S.*, 464 F. Supp. 804, 807 (D.D.C. 1979).

In *Judicial Watch*, 108 F. Supp. 2d 19, the District Court for the District of Columbia held that the Export-Import Bank properly withheld, *inter alia*, "'the amount of the insurance premium'" being paid by the exporter to the Bank, since "a competitor who is familiar with the way the Bank determines its premium rates . . . could deduce the shipment amount from the premium amount." *Id.* at 31. Before reaching that conclusion, the court emphasized that the information sought by the FOIA requester was obtained by the Export-Import Bank "from the insurance applicants themselves, commercial lenders of the applicant, or a purchaser of the goods at issue." *Id.* at 28.

In *Comstock International*, 464 F. Supp. 804, the District Court for the District of Columbia protected from disclosure a loan agreement to which the Export-Import Bank was a party. The agreement detailed, among other things, "the terms

and conditions under which [the Export-Import Bank] and [a private bank]" extended credit. *Id.* at 806. Those details were protected from disclosure even though "the information contained in the loan agreement [was] not submitted to the government but rather generated by it through Eximbank's participation in the negotiation process." *Id.* at 807.

Royalty Rates Paid by Government Licensees. The NIH develops inventions that the government subsequently licenses to third parties. During the licensing process, the government "negotiates" a final royalty rate with licensees. *See Pub. Citizen Health Research Group* v. *NIH*, 209 F. Supp. 2d 37, 44 (D.D.C. 2002). Neither the licenses nor the rates set therein would exist but for government approval.

In *Public Citizen*, 209 F. Supp. 2d 37, the District Court for the District of Columbia held that the negotiated final royalty rate is "obtained from a person" and, therefore, subject to Exemption 4 protection. *See id.* at 44 ("Even though the final royalty rate is arrived at through negotiation, this does not alter the fact that the licensee is the ultimate source of this information."). The court then refused to order disclosure of the negotiated royalty rates, because competitors could use those rates, to the licensee's competitive disadvantage, to "make a rough calculation of [the licensee's] profit margin on a particular drug." *Id.* at 47.

Treasury Bond Issuances. The Treasury Department issues bonds to private entities in order to finance the public debt.

In *Clarke* v. *U.S. Dep't of Treasury*, No. 84-1873, 1986 WL 1234 (E.D. Pa. Jan. 28, 1986), the District Court for the Eastern District of Pennsylvania held that "the names and addresses" of a certain type of Treasury bond, along with details concerning "the [bonds'] dollar amount, coupon and maturity date[s]," were "[u]nquestionably . . . obtained from persons outside the government." *Id.* at *2. That ruling enabled the Treasury Department to maintain its "'long tradition of confidentiality of the ownership of United States Treasury securities,'" breach of which would have enabled market participants to gain a "'significant competitive advantage'" by learning the positions of other bondholders. *Id.* at *3.

Line-Item Pricing in Government Contracts. Agencies, such as NASA and the Department of the Air Force, contract with private parties for the provision of goods or services. In doing so, those agencies may request "the submission of proposed prices for certain contract line items." *McDonnell Douglas Corp.* v. *NASA*, 180 F.3d 303, 304 (D.C. Cir. 1999). The government contract is then subject to "further negotiations on prices and terms." *Id.* Neither the contract nor its specific terms would exist but for government approval.

In *McDonnell Douglas*, the D.C. Circuit concluded that "pricing information contained in a contract" between McDonnell Douglas and NASA was protected by Exemption 4. *Id.* In *Canadian Commercial Corp.* v. *Dep't of the Air Force*, 514 F.3d 37 (D.C. Cir. 2008), the D.C. Circuit likewise observed that negotiated line-item prices between McDonnell Douglas and the Air Force "f[ell] within

Exemption 4 of the FOIA if [their] disclosure would 'impair the government's ability to obtain necessary information in the future' or 'cause substantial harm to the competitive position of the person from whom the information was obtained.'" *Id.* at 40.[11]

* * *

The Second Circuit's ruling cannot be reconciled with this line of cases. If the FRBs' "executive action" here—which consisted only of approving Discount Window loans—were enough to eliminate Exemption 4 protection, Exemption 4 protection would be unavailable in these other commercial settings, where the government is typically *more* involved in setting the final terms of the transaction.

Thus, if left to stand, the Second Circuit's ruling would impair numerous agency programs that depend on assuring third parties that details of their commercial transactions with the government will

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[11] The D.C. Circuit noted, but did not consider, the Government's unpreserved argument that "pricing information is not 'obtained from' a contractor but rather emerges from contract negotiations between the parties." *Id.* at 41 n.*.

Subsequently, in a similar case involving unit-pricing information, the District Court for the District of Columbia stated that "the parties agree that the information is 'commercial or financial information obtained from a person.'" *Gen. Elec. Co.* v. *Dep't of Air Force*, 648 F. Supp. 2d 95, 101 (D.D.C. 2009). In doing so, the court noted that, in light of the D.C. Circuit's ruling in *Canadian Commercial*, the Air Force no longer disputed whether "unit pricing information could come within the scope of Exemption 4 at all, regardless of whether [such information] could be shown to be confidential." *Id.* at 101 n.5.

remain confidential. If federal agencies cannot provide these assurances, third parties will turn away from these programs, impairing the programs' effectiveness and the national interests they serve.[12]

B. The Second Circuit's Ruling Contravenes the Established Principle That an Agency May Withhold "Inextricably Intertwined" Exempt and Non-Exempt Data.

The Second Circuit's ruling, if left to stand, will impair numerous government programs. *See supra* at 22-26. It will also wreak havoc in FOIA law by undermining the settled principle, codified in 5 U.S.C. § 552(b) and recognized across the Circuits, that permits an agency to withhold information where it consists of exempt and non-exempt data that are "inextricably intertwined." *See* 5 U.S.C. § 552(b) (requiring agencies to disclose non-exempt information only to the extent that such information

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[12] *See Pub. Citizen*, 209 F. Supp. at 53 (crediting affidavit stating that "'licensees will not negotiate with NIH without an expectation that the financial terms of the licenses will remain confidential'"); *Judicial Watch*, 108 F. Supp. 2d at 30 ("[F]oreign purchasers may seek financing outside of the United States . . . if subjected to the risk of disclosure of their confidential commercial or financial information."); *Clarke*, 1986 WL 1234, at *2-3 ("releasing the requested information would harm the national interest because investors would be less likely to purchase government bonds in the future"); *Comstock Int'l*, 464 F. Supp. at 808 (crediting "'specific, factual or evidentiary material'" demonstrating, *inter alia*, that disclosure would make loan applicants "unwilling[] to subject themselves to the possible risk of disclosure").

can be "reasonably segrega[ted]" from that which is exempt).[13]

This rule applies fully here. By any measure, the terms on which banks applied for Discount Window loans existed prior to—and independent of—the loans' approval. In other words, the Reports summarize *both* the information "obtained from" banks, most notably their identities, as even Bloomberg did not dispute below, and the FRB's decision to make loans on those terms. Similarly, the Reports inextricably reflect the terms on which banks accepted Discount Window loans.

Because disclosing the terms on which FRBs approved Discount Window loans necessarily reveals (i) the terms on which each bank *applied* for these loans, and (ii) the terms on which each bank *accepted* these loans, the Reports reflect information "obtained from" the banks that is inextricably

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[13] *See also Mead Data Cent., Inc.* v. *U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) (agency may withhold non-exempt information if "inextricably intertwined" with exempt information); *Rein* v. *Patent & Trademark Office*, 553 F.3d 353, 374 (4th Cir. 2009) (same); *Missouri Coalition for Envt'l Found.* v. *Army Corps of Eng'rs*, 542 F.3d 1204, 1212 (8th Cir. 2008) (same); *Miccosukee Tribe of Indians of Fla.* v. *U.S.*, 516 F.3d 1235, 1257 n.22 (11th Cir. 2008) (same); *Inner City Press/Community on the Move* v. *Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 249 n.10 (2d Cir. 2006) (same); *Flightsafety Servs. Corp.* v. *Dep't of Labor*, 326 F.3d 607, 613 (5th Cir. 2003) (same); *Patterson* v. *IRS*, 56 F.3d 832, 840 (7th Cir. 1995) (same); *Church of Scientology Int'l* v. *U.S. Dep't of Justice*, 30 F.3d 224, 228 (1st Cir. 1994) (same); *Andrews* v. *Veterans Admin.*, 838 F.2d 418, 422 (10th Cir. 1988) (same); *Willamette Indus., Inc.* v. *U.S.*, 689 F.2d 865, 867 (9th Cir. 1982) (same).

intertwined with the information "generated" by the FRBs. Thus, the Reports "contained no reasonably segregable non-exempt information," as the Board explained when detailing its reasons for denying Bloomberg's FOIA request. (JA-57.)

The Second Circuit's legal conclusion that the information in the Reports was not "obtained from" borrowing banks is thus untenable. It also leads to a result at odds with the statute: Under the Second Circuit's reasoning, Exemption 4 would not apply *even if* disclosure of the Reports would harm the very third parties (here, banks) that Exemption 4 was designed to protect. *See Bloomberg*, 601 F.3d at 150 (acknowledging the "plausible" and "forcefully made" arguments that disclosure of the information sought by Bloomberg would "harm the banks that borrowed"). This conclusion can only be the result of a "nonfunctional" interpretation of the FOIA that fails to give effect to the "reasons for [the] exemption." *John Doe Agency*, 493 U.S. at 157.

II. THE SECOND CIRCUIT OPENLY SPLIT WITH THE D.C. AND FIRST CIRCUITS IN HOLDING THAT EXEMPTION 4 DOES NOT PROTECT "CONFIDENTIAL" INFORMATION WHOSE DISCLOSURE WOULD IMPAIR THE EFFECTIVENESS OF FEDERAL PROGRAMS.

The Second Circuit, creating a conflict with the D.C. and First Circuits, refused to interpret the term "confidential" to include information whose disclosure would impair government programs. The Second Circuit did so on the basis that such an interpretation (1) finds "no basis" in the statute and

(2) would represent an unbounded expansion of Exemption 4. *See Bloomberg*, 601 F.3d at 150-51.

This split is on an undeniably important question of FOIA law: What is the governing test to determine whether information is "confidential" within the meaning of Exemption 4, and whether this test allows an agency to withhold information when its disclosure would harm agency programs.

The *National Parks* definition of the term "confidential" is well established and should be endorsed by this Court. *See Contract Freighters, Inc.* v. *Sec'y of U.S. Dep't of Transp.*, 260 F.3d 858, 861 (8th Cir. 2001) (observing that "the *National Parks* test" has been "widely recognized and applied by the circuit courts when construing Exemption 4." (collecting authority)). Recognizing that FOIA "contains no definition of the word 'confidential,'" the *National Parks* court looked—properly—to the "legislative purpose" underlying the exemption in order to interpret it meaningfully. 498 F.2d at 767. This approach is fully consistent with this Court's instruction to interpret FOIA exemptions practically, by "looking to the reasons for [the] exemption" and "apply[ing] a workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure." *John Doe Agency*, 493 U.S. at 157.

The Second Circuit erred when, though it has long endorsed the *National Parks* interpretation of Exemption 4, *see Cont'l Stock Transfer & Trust Co.* v. *SEC*, 566 F.2d 373, 375 (2d Cir. 1977), it nonetheless refused to read *National Parks* to protect an agency's interest in advancing its programs. The First Circuit

rejected just such an "unduly restrictive" interpretation of *National Parks*, recognizing that *National Parks* "identified the two interests which are *most frequently* threatened by the disclosure of commercial or financial information," but did not impose a rigid limitation "on the number of legitimate interests" which the exemption protects. *9 to 5*, 721 F.2d at 1, 9 (emphasis added). Instead, the *National Parks* test was designed to protect from disclosure information whose release would harm "an identifiable private or governmental interest which the Congress sought to protect by enacting exemption 4." *Id.* at 10. One of these interests is that of the government in withholding information "which would be particularly helpful to agency officials in carrying out their mandate." *Id.* This interest stems directly from Exemption 4's legislative history, in which "the problems of compliance and program effectiveness are mentioned as governmental interests possibly served by this exemption." *National Parks*, 498 F.2d at 770 n.17.

The Second Circuit further erred when it reasoned that the program-effectiveness test recognized by the D.C. and First Circuits would "give impermissible deference to the agency." *Bloomberg*, 601 F.3d at 150. This test is nothing like the "vague 'public interest'" standard rejected by this Court, for purposes of Exemption 5, in *Merrill*, 443 U.S. at 354. Unlike Exemption 5, Exemption 4 requires the government to prove that the information sought to be protected, in addition to being "privileged or confidential," is obtained from a third party and is a "trade secret[]" or "commercial or financial" in nature. 5 U.S.C. § 552(b)(4). Those requirements ensure that the test can be invoked only in a

commercial setting when the government interacts with third parties that supply presumptively sensitive business information in such transactions.

Even in this limited setting, the program-effectiveness test is not toothless. To satisfy this test, the government must still "identify the particular interest [protected by the exemption], and . . . demonstrate how that interest will be harmed by public disclosure of the specific information which has been requested." *9 to 5*, 721 F.2d at 10; *accord Critical Mass*, 830 F.2d at 286. In practice, the government must submit evidence, as the Board did here, showing how disclosure will harm participants in the identified government program—and therefore discourage them from participating in the future—if the requested information is released.[14]

This evidence, moreover, is not something generated *ex post* and subject to agency abuse; it serves as the cornerstone for a confidentiality policy that, as with the Discount Window, is typically in longstanding use.[15]

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[14] *See, e.g., Clarke*, 1986 WL 1234, at *2-3 (crediting government affidavit demonstrating that market participants "'with access to [bondholder] data concerning the positions of other participants would have a significant competitive advantage'"); *Pub. Citizen*, 209 F. Supp. 2d at 53 (concluding that disclosure of the requested information "would seriously impair [the government's ability] in carrying out its public health responsibilities" (internal quotation marks omitted)).

[15] *See, e.g., Clarke*, 1986 WL 1234, at *3 (crediting government affidavit discussing "'the long tradition of confidentiality of the ownership of United States Treasury securities'"); *Pub. Citizen*, 209 F. Supp. 2d at 53 n.9 (noting that the NIH "takes

(footnote continued)

In all, the program-effectiveness is consistent with *National Parks*' approach to interpreting Exemption 4; fits within the exemption's legislative design; and appropriately balances the public's interest in disclosure against "the needs of the Government to protect certain kinds of information." *John Doe Agency*, 493 U.S. at 157. This Court should therefore grant this petition in order to provide a definitive interpretation of the term "confidential"—the centerpiece of Exemption 4—that will resolve the existing split in the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(footnote continued)
confidentiality [of royalty information] very seriously because every licensing agreement contains a confidentiality clause").